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2 United States Bankruptcy Judge
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5 **September 21, 2007**

6 MARK L. HATCHER
CLERK U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
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DEPUTY

8 **UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

9 In re:

10 DONALD WEHMEYER,

11 Debtor.

Case No. 03-52468

12 **MEMORANDUM DECISION**

13 **NOT FOR PUBLICATION**

14 This matter came on for hearing on August 23, 2007, on Donald Wehmeyer's (Debtor)
15 Motion for Relief from Order Authorizing Sale of the Debtor's Interest in Real Property
16 Pursuant to FRCP 60(b). Based on the pleadings, evidence and arguments of counsel, the
17 Court's findings of fact and conclusions of law are as follows:

18 **FINDINGS OF FACT**

19 The Debtor filed a Chapter 7 petition for relief on December 9, 2003. After the Debtor
20 received a discharge, the case was closed on March 23, 2004. On November 9, 2004, the
21 case was reopened on the Chapter 7 Trustee's (Trustee) motion to allow him to administer an
22 asset that he did not believe had been previously disclosed--the Debtor's interest in his
23 deceased mother's trust consisting primarily of a parcel of improved real property (Trust
24 Property). On April 13, 2007, the Trustee filed a motion to authorize the sale of the Debtor's
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1 interest in the Trust Property. Service was made on parties listed in the Debtor's mailing
2 matrix, including the Debtor and his then attorney, at the addresses on file with the U.S.
3 Bankruptcy Court. As set forth in the Trustee's motion, because the shares to the Trust
4 Property are held by three siblings under the Revocable Trust of Josephine Wehmeyer (1992
5 Trust), the Debtor's share was estimated to have a value of approximately \$44,000. The
6 Trustee sought to approve the sale of the Debtor's interest for \$50,000 to the Debtor's brother
7 Dale Wehmeyer. On May 7, 2007, the Court approved the sale without objection.
8

9 There is no dispute that the three siblings were and currently are in litigation over the
10 Trust Property. At issue have been two revocable trusts: the 1992 Trust and a second
11 revocable trust of Josephine Wehmeyer dated May 2, 2000 (2000 Trust). In 2002, the Debtor
12 and his sister brought an action in the Superior Court of California regarding the validity of the
13 2000 Trust. A judgment declaring the 2000 Trust invalid was entered on August 30, 2005,
14 and after an appeal was dismissed in 2006, a Remittitur was issued on December 27, 2006.

15 On or about February 21, 2007, the Trust Property was listed for sale by the trustee of
16 the 1992 Trust for \$2,950,000. A contract to sell the Trust Property was entered into on
17 March 16, 2007, for \$2,600,000. Litigation regarding the 1992 Trust commenced on July 17,
18 2007. Subsequently, a lis pendens was filed and recorded on the Trust Property. As stated in
19 the Declaration of Vikram Brar, state court counsel for Dale Wehmeyer, if the plaintiff in the
20 current civil action prevails, the Trust Property will not belong to the 1992 Trust. Mr. Brar also
21 states it is still not clear what the Debtor's interest in the 1992 Trust is worth at this time.
22

23 CONCLUSIONS OF LAW

24 As grounds for relief from the Court's May, 2007 order, the Debtor alleges mistake,
25 inadvertence or excusable neglect, under Fed. R. Civ. P. 60(b)(1); newly discovered

1 evidence, under Fed. R. Civ. P. 60(b)(2); fraud, misrepresentation, or other misconduct, under
2 Fed. R. Civ. P. 60(b)(3); and any other reason justifying relief from the judgment, under Fed.
3 R. Civ. P. 60(b)(6). The burden of proof is on the Debtor to establish grounds for Fed. R. Civ.
4 P. 60(b) relief. Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1988).

5 1. **Fed. R. Civ. P. 60(b)(1), mistake, inadvertence or excusable neglect:**

6 The Debtor argues that relief from the Court's May, 2007 order is warranted due to
7 mistake or excusable neglect by (1) the Debtor himself in failing to maintain a current address
8 with the Bankruptcy Court and in assuming his bankruptcy counsel would be monitoring the
9 case; (2) the Debtor's bankruptcy counsel in failing to notify the Debtor of the Trustee's motion
10 and/or take action on the motion, and (3) the Trustee in failing to verify the Debtor's correct
11 current address and failing to inform the Debtor's California counsel about the motion and/or
12 consult with him regarding the value of the Trust Property.

14 Fed. R. Bankr. P. 4002(a)(5) requires a debtor to file a statement of any change of the
15 debtor's address. Under Fed. R. Bankr. P. 9010, a party may appear in a bankruptcy case,
16 and the party's attorney appearing on its behalf must file a notice of appearance. When
17 "inadvertent conduct leads to a judgment, a claim of mistake or excusable neglect will always
18 fail if the facts demonstrate a lack of diligence." 12 James Wm. Moore et al., Moore's Federal
19 Practice § 60.41[1][c][ii] (3d ed. 2007). "Ignorance of, or inattention to, procedural law is not
20 usually excusable neglect." Moore et al., supra, § 60.41[1][c][iii].

22 The Debtor does not dispute that he failed to update his last address with the
23 Bankruptcy Court, as he no longer resides at the address provided in his bankruptcy petition.
24 Similarly, the Debtor has provided no evidence that he kept his bankruptcy counsel current as
25 to changes in his residential address. The Debtor's lack of diligence and inattention to his

duty to inform the Bankruptcy Court of his current address does not constitute mistake or excusable neglect. Additionally, because the certificate of service indicates that the Debtor was served at his address on record with the Clerk of the Court, absent contrary information, it would not have been unreasonable for bankruptcy counsel and the Trustee to assume the Debtor received notice of the Trustee's motion. That the Debtor's residence was previously subject to an Order Granting Relief from Stay does not change this conclusion, as such relief does not mean that a foreclosure or other disposition of his residential property necessitating his relocation took place.

The Debtor further argues it was mistake or excusable neglect for his bankruptcy counsel to fail to take action on the Trustee's motion. Yet, the Trustee's motion indicates that the value of the Debtor's estimated interest in the Trust Property was approximately \$44,000, but that the estate would receive \$50,000 for this asset. Absent evidence that bankruptcy counsel had knowledge that the asset was worth more than this amount, there is no basis to conclude that bankruptcy counsel's failure to oppose the Trustee's Motion was a mistake or negligence.

Additionally, the Debtor has provided no evidence that it was, or is, the Trustee's duty to verify that the last address provided by a debtor for purposes of mailing notices concerning disposition of assets of the estate is correct. This duty, as set forth in Fed. R. Bankr. P. 4002(a)(5), lies only with the Debtor. Even if the Trustee knew of the Debtor's new address, he "would be required to serve the debtor at an incorrect prior address absent the filing of a statement of new address." 9 L. King, Collier on Bankruptcy ¶ 4002.06, p. 4002-16 (15th ed. rev. 2007). At the same time, had Debtor's California counsel wanted to be kept informed of

1 the bankruptcy proceedings and the disposition of assets of the estate all that was needed
2 was for him to file a notice of appearance. This was not done.

3 The only persuasive evidence in the record with respect to the Trustee not consulting
4 California counsel on the Trust Property's value--the Trustee's Objection to Motion for Relief
5 from Order and supporting Declaration--concludes that according to the current litigation
6 status, the 1992 Trust was not required to sell the Trust Property and distribute the funds.
7 Thus, at the time of his decision to sell the Debtor's interest, the Trustee could not say with
8 certainty that any value would be available for the estate within a reasonable time. When the
9 Trustee received Dale Wehmeyer's offer, the Trustee's declaration indicated that he reviewed
10 the case again at length as well as the voluminous pleadings. The Trustee decided that any
11 payout to the estate had been delayed so long that accepting the offer and starting the sale
12 process was good for the estate. The Trustee believed that if the price offered was in fact not
13 in the best interest of the estate, someone would object to the sale or bid higher. No one
14 objected, and notably, the Court has not received any competing bids.

16 The Debtor has presented the \$2,600,000 sales price of the Trust Property as evidence
17 of the value of his interest in the Property. However, as the Trustee's and Mr. Brar's
18 declarations indicate, the ultimate value of the Debtor's interest in the Trust Property remains
19 to be determined by the ongoing litigation and application of the terms of the 1992 Trust.
20 Thus, the Debtor has provided no evidence that his interest is more or less than the \$50,000
21 offered by Dale Wehmeyer and authorized by the Court. It is also noteworthy that the Debtor
22 or other interested parties have not even now conditionally offered more than the Trustee
23 received.
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1 **2. Fed. R. Civ. P. 60(b)(2), newly discovered evidence:**

2 The Debtor appears to suggest that the California Superior Court's Judgment of August
3 30, 2005, declaring the 2000 Trust invalid and thereby altering how the Trust Property is
4 divided among the three siblings, is newly discovered evidence of the Debtor's percentage
5 interest in the Trust Property.

6 The Debtor has not demonstrated that he is entitled to relief under this provision, as he
7 has not established that at the time of the Trustee's motion, the evidence could not have been
8 discovered through due diligence, or that the evidence was of such magnitude that production
9 of it earlier would have been likely to change disposition of the case. Jones v. Aero/Chem
10 Corp., 921 F.2d 875, 878 (9th Cir. 1990). This analysis also applies to the allegation that the
11 listing and sales price of the Trust Property constitutes newly discovered evidence as to the
12 value of the Debtor's interest in the Trust Property. As previously stated, even though the
13 Trust Property was listed for a sales price of over \$2 million, there is no evidence regarding
14 what amount, if any, will be available for the Debtor after state court litigation and application
15 of the terms of the 1992 Trust.

17 **3. Fed. R. Civ. P. 60(b)(3), fraud, misrepresentation, or other misconduct:**

18 The Debtor must establish by clear and convincing evidence that the Court's May,
19 2007, sale order was obtained through fraud, misrepresentation, or other misconduct. De
20 Saracho v. Custom Food Machinery, Inc., 206 F.3d 874, 880 (9th Cir. 2000). The Debtor
21 alleges that Dale Wehmeyer misrepresented to the Trustee the value of the Trust Property.
22 The Debtor, however, has provided no evidence in support of this allegation. There is no
23 evidence of what Dale Wehmeyer knew or said to the Trustee concerning the value of the
24 Trust Property at the time he made the offer to the Trustee; there is no evidence that the

1 Trustee relied on his statements when he represented to the Court that that the Debtor's
2 share would amount to approximately \$44,000; and there is no evidence that Dale Wehmeyer
3 made a false statement to the Trustee knowing that it was false.

4 Moreover, it is notable that the party against whom the Debtor alleges was the object of
5 fraud/misrepresentation has not alleged fraud. In fact, the Trustee opposed the Debtor's
6 Motion for Relief from Order, and the facts as set forth in the Trustee's Objection and
7 Declaration make no suggestion of misrepresentation or fraud by Dale Wehmeyer.
8

9 **4. Fed. R. Civ. P. 60(b)(6):**

10 This catchall provision only applies when there are reasons for relief other than those
11 set out in the more specific clauses of Fed. R. Civ. P. 60(b), and when there are
12 "extraordinary circumstances" justifying relief. Moore et al., supra page 3, § 60.48[1]. "The
13 party must demonstrate both injury and circumstances beyond his control that prevented him
14 from proceeding with the prosecution or defense of the action in a proper fashion." Cnty.
15 Dental Servs. v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002).

16 In this instance, the Debtor failed to notify the Bankruptcy Court of his current address,
17 and California counsel failed to enter an appearance. Relief under Fed. R. Civ. P. 60(b)(6)
18 requires a demonstration of both injury and extraordinary circumstances beyond the Debtor's
19 control that prevented him from participating in the Trustee's sale of the Trust Property. The
20 Debtor has established neither. Any alleged injury occurring because of a lack of notice or
21 participation stems from the Debtor's own actions. Furthermore, the Debtor has yet to
22 establish that the Trust Property's value is greater than the amount estimated by the Trustee.
23 Nor has the Debtor established or provided evidence of negligence, let alone gross
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1 negligence, by either the Trustee or his former bankruptcy counsel, as is required by the Ninth
2 Circuit for relief under this provision. Cnty. Dental Servs., 282 F.3d at 1169.

3 As of the date of the hearing, the Debtor has not met his burden of proof or provided
4 evidence sufficient for relief under Fed. R. Civ. P. 60(b), and his motion is denied.

5 DATED: September 21, 2007

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8 Paul B. Snyder
9 U.S. Bankruptcy Judge

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